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Kathryn Kizer

BEHIND THE GUISE OF GANG MEMBERSHIP: ENDING THE UNJUST CRIMINALIZATION

KATHRYN KIZER*

"The violence comes from the anger. The anger of being poor and never having enough."[1]

I. INTRODUCTION

If a person is involved with a criminal street gang, lives in an urban community, struggles to make ends meet, and is a person of color, he is likely to face another hardship: harsher criminalization because of his gang membership.[2]

Today, nearly every state in the United States has enacted some sort of legislation pertaining to gangs or gang activity.[3] For example, over half of all states impose more severe penalties

* Kathryn Kizer is a member of the Class of 2012 at DePaul University College of Law. Upon graduation, she plans to practice criminal defense in Chicago. She would like to thank the 2011-2012 J4SJ Board for its support throughout the editing process. She would especially like to thank Professor Sumi Cho for encouraging her to write this article for her Race & Racism in U.S. Law Seminar. Finally, she dedicates this article to all of the individuals caught in the grasp of the criminal justice system who inspire her to fight.

1 Thugtrash, gang member, http://www.gangstyle.com/gangs_gangster_quotes.php (last visited Oct. 28, 2011).

2 *See generally* Judithe Greene & Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, JUST. POL'Y INST., 6-8 (July 17, 2007), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/07-07_rep_gangwars_gc-ps-ac-jj.pdf.

3 National Gang Center, "Highlights of Gang-Related Legislation," (Spring 2011), http://www.nationalgangcenter.gov/Legislation/Highlights (last visited Oct. 11, 2011).

for criminal activity that is gang-related.[4] Although fewer gang members exist today than ten years ago and gang activity "account[s] for a relatively small share of crime in most jurisdictions," a majority of the country has enacted these laws because they believe the U.S. faces a "national gang 'crisis.'"[5] As a result of this misperception and fear, states have waged low-level police warfare against perceived gang members. These massive police crackdowns on gang affiliation are not only ineffective, they fly in the face of the realities of being a poor, young person of color in a blighted American community.[6] In response to this national war on gangs, opponents have waged their own fight to try to reduce the criminalization of gang membership.[7]

The U.S. Supreme Court has said that an individual must not be punished because of his or her "status" under the Cruel and Unusual Punishment Clause of the Eighth Amendment.[8] In American society, gang membership is a status—one into which many are socialized.[9] Therefore, to criminalize someone for his gang membership is to violate his right to be free from cruel and unusual punishment. These laws must be eradicated. And because the usual toolkit for fighting anti-gang laws is outdated and ineffective, a new status-based discourse is necessary.

Although opponents of anti-gang legislation typically challenge these laws through traditional overbreadth and vagueness

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4 *Id.*

5 Greene & Pranis, *supra* note 2, at 6.

6 *See* Thomas A. Myers, Note, *The Unconstitutionality, Ineffectiveness, and Alternatives of Gang Injunctions*, 14 MICH. J. RACE & L. 285, 301 (2009) (discussing the ineffective police suppression tactics implemented in Los Angeles).

7 For example, in the Cook County Public Defender's office in the Chicagoland area, a handful of Assistant Public Defenders have unsuccessfully attempted to bring constitutional challenges to the Illinois gang criminalization law, 720 ILL. COMP STAT. 5/24-1.8 (2011).

8 Robinson v. California, 370 U.S. 660, 666 (1962).

9 *See* Aaron B. Overton, Note, *Federal Gang Laws: A New Tool Against a Growing Threat or Overbroad and Dangerous?* 9 RUTGERS RACE & L. REV. 405, 411 (2008).

doctrines, a more effective avenue is the Eighth Amendment status doctrine, because traditional doctrines *permit* the criminalization of gang members while the status doctrine better supports sociological realities: people of color who belong to gangs do so because of a long history of hardship and should not be further punished because of this status.

Street gang members targeted by anti-gang laws are typically young men of color born into communities with few options for economic survival, protection or role models. Thus, the criminalization of gang members is essentially the criminalization of poor people of color who have had to survive generations of racism and societal marginalization. This proposed platform for challenging anti-gang legislation will therefore demonstrate why a person should not be punished more severely because of his status as a gang member.

Nearly all existing research surrounding the criminalization of gang membership focuses on two select constitutional doctrines: overbreadth and vagueness.[10] As a result, theorists tend to focus on why criminalizing gang membership violates a person's First Amendment or Due Process Clause rights.[11] For example, some argue that the means used to deal with gang violence—harsher punishment—is not effective and therefore unconstitutional.[12] Others claim that the freedom of association necessarily entails one's right to associate with a gang and, therefore, such legislation is unconstitutional.[13] All of these approaches invoke more traditional avenues of constitutional analysis. However, little to no analysis exists that takes an Eighth Amendment approach—the ban on status-based punishment—and invokes sociological research to argue for the eradication of legislation that criminalizes gang membership.

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[10] *See, e.g.*, Overton, *supra* note 9.

[11] *Id.* at 418.

[12] *See, e.g.*, Myers, *supra* note 6 at 295-96.

[13] Many criminal defense attorneys, for example, have suggested writing this analysis with a focus on the right to association.

Under the seminal case of *Robinson v. California*, the U.S. Supreme Court found that it was cruel and unusual to punish an individual solely for being a narcotics addict—a status for which he could not fairly be criminalized.[14] There have been attempts to expand this status doctrine to alcoholism, sexual disorders, mental illness and homelessness.[15] However, few have been successful in light of the dearth of U.S. Supreme Court precedent governing this area of law. State and federal decisions across the country amount to a conflicting web of attempted *Robinson* interpretations.[16] This web reflects the confusion surrounding the intended application of *Robinson*. Although some attempts have been made to apply the status doctrine to gang membership, this is a largely undeveloped territory.[17] Thus, with the aid of the extensive sociological research on gangs, a ripe opportunity exists to use the status doctrine to strike anti-gang laws as unconstitutional.

This critique will first use a blend of articles, books and documentaries to explore the nature of gang membership—why people join, why they stay and the historical forces that influence the "decision" to join. This research will show that people of color in poor neighborhoods who join gangs often do so because of forces greater than themselves: a history of oppression, a lack of opportunity for safe socialization and few prospects for upward mobility.

Following the sociological discussion, this critique will examine the legal ways in which gang members are criminalized,

14 *Robinson*, 370 U.S. at 666.

15 *See* Doe v. City of Lafayette, 377 F.3d 757, 782 (7th Cir. 2004) (Williams, dissenting); Julliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293 (1996).

16 *See, e.g.,* United States v. Black, 116 F.3d 198 (7th Cir. 1997).

17 *See* City of Chicago v. Youkhana, 660 N.E.2d 34 (Ill. App. Ct. 1995); Transcript of Oral Ruling on Motion Argument, *People v. Navarrete*, No. 10 CR 11085 (Ill. Cir. Ct. Cook Co. July 21, 2011) (during his oral ruling, the judge rejected a constitutionality challenge to the Illinois anti-gang law and chose not to substantively address the defense's status argument).

using the Illinois Unlawful Use of a Firearm by a Street Gang Member law as an illustration. The legal discussion will transition into an analysis of the traditional platforms for contesting the constitutionality of anti-gang laws. This will focus on the two most common doctrines: vagueness and overbreadth. The discussion will conclude with an explanation as to why these traditional approaches cannot eradicate anti-gang laws.

After a survey of traditional constitutional doctrines, this critique will elucidate the less commonly known status doctrine of the Eighth Amendment. This section will show how the U.S. Supreme Court has established the status platform without fully developing its meaning, which has caused confusion among lower courts regarding its scope and application. However, this analysis will show that if developed more coherently, the status doctrine can protect people from harsher punishment for their gang membership—a guise for skin color, neighborhood and socioeconomic status.

Finally, this critique will propose a multidisciplinary approach as the most persuasive way to eradicate these laws: a non-traditional, Eighth Amendment legal analysis that reflects the sociological underpinnings of gang life. This section will blend legal doctrine and sociological literature, weaving historical influences throughout the discussion. The sociological context will reveal how the Eighth Amendment should be framed to prohibit the criminalization of gang membership—a status, just like drug addiction or chronic alcoholism.

This critique will intervene in the discussion about the constitutionality of anti-gang laws by contending that (1) the traditional constitutional doctrinal approaches do not reach far enough to render these laws unconstitutional; (2) the Eighth Amendment status doctrine, which has been previously limited to drug addiction, alcoholism and other illness-type conditions, should be expanded to gang membership; and (3) a multidisciplinary approach that uses both law *and* sociological literature

is the most effective platform for arguing that gang membership should not be criminalized.

The disproportionate effect on young men of color, coupled with the history of racism and socioeconomic inequalities that have given rise to gangs, render this criminalization illegal, immoral and harmful to efforts of de-incarceration in the criminal justice system. If activists are seeking to dismantle mass incarceration in the U.S., laws that criminalize gang membership must be eradicated. To accomplish this, a new theoretical approach is necessary.

II. What Are Gangs, Why Do They Exist, and How Are They Criminalized?

A. What are gangs?

Various definitions of "gangs" are splattered across penal codes, textbooks, scholarly works and documentaries. Whether lawmakers view their enemy simply as a "gang" or more specifically a "criminal street gang," the targeted group is clear: organized, urban enterprises of young men who engage in criminal activity.[18] This understanding of the criminal street gang, however, is flawed.

Although legislators across the U.S. have attempted to define gangs for purposes of statutes, ordinances and civil injunctions, no uniform definition exists.[19] Moreover, judges and lawyers tend to hold misperceptions about street gangs; they believe these groups are organized, hierarchical, criminally advanced enterprises.[20] Malcolm W. Klein, Director of the Social Science Research Institute at the University of Southern California, says

[18] Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 Campbell L. Rev. 31, 32 (1998).
[19] National Gang Center, *Brief Review of Federal and State Definitions of the Terms "Gang," "Gang Crime," and "Gang Member,"* 1-2 (Dec. 2009).
[20] Malcolm W. Klein, *Gangs: What Are Street Gangs When They Get to Court?*, 31 Val. U.L. Rev. 515, 518 (1997).

this misperception is actually reflective of the more sophisticated "drug gang."[21] Drug gangs are often assumed to be behind the street gang activity in the U.S., causing prosecutors to equate a criminal defendant's gang affiliation with a drug gang.[22] Street gangs, however, are more common, larger and more loosely structured groups that engage in ranging degrees of criminal activity.[23] This confusion elevates the fear and perceived dangerousness of street gang members when they get to court.[24] Moreover, it allows states to justify the passage of anti-gang laws by relying on people's fears that gangs are organized, mob-like enterprises taking over the streets.[25]

Although researchers have similarly failed to agree on a definition of gangs,[26] they have identified predominate characteristics that more closely resemble urban street gangs. According to Klein, there are seven common characteristics:[27] (1) territoriality; (2) variation in criminal offenses; (3) male dominated; (4) "[a] preponderance of racial or ethnic minority membership, usually black or Hispanic;" (5) ages ranging, on average, be-

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21 *Id.*

22 *Id.* at 517, 520.

23 *See id.* at 517.

24 *Id.* at 518, 520.

25 During a motion argument contesting the constitutionality of an Illinois anti-gang law, Assistant State's Attorney Victoria Kennedy continually referenced gang-related violence as a way of justifying the need to criminalize gang membership. Transcript of Motion Argument at 11-12, People v. Vicente Navarrete, No. 10 CR 11085 (Ill. Cir. Cook Co. Ct. June 30, 2011). Moreover, in commenting on the passage of this law, State's Attorney Anita Alvarez stated, "This new law will be an extremely important tool for police and prosecutors in the battle against gang and gun violence in our communities." Press Release, Governor's Office, Governor Quinn Signs Legislation Targeting Illegal Firearm Possession by Gang Members (Dec. 3, 2009), *available at* http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=8076.

26 Bjerregaard, *supra* note 18, at 43; Kim Strosnider, *Anti-Gang Ordinances after City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 105 (2002).

27 Klein, *supra* note 20, at 516.

tween sixteen and twenty-one; (6) higher concentrations in urban environments; and (7) an orientation toward criminal activity.[28]

These traits paint a picture of gangs as groups of young men of color in poor urban neighborhoods. Although this stereotype—poor, minority youth in the inner city—is closer to the meaning of a street gang than judges and lawyers understand, it still falls short of the reality of who joins gangs. According to some estimates, the majority of gang members in the country are actually white,[29] yet there exists a "refusal of some law enforcement agencies to label white groups as gangs, even when they meet all of the elements of a particular jurisdiction's definition of a gang."[30] For example, the National Youth Gang Service does not include certain predominantly white gangs within its definition—motorcycle gangs and hate groups.[31] This means that the criminal street gang—the enemy that many lawmakers and law enforcement are attempting to bring down—is misunderstood, despite the fact that "gang members" are prosecuted every day across the country.[32]

This tangled definitional landscape has two notable effects. First, white youth gang members tend to evade criminalization.[33] Second, "the amorphous concept of the 'gang' invites discretion-

[28] *Id.* at 516-17.

[29] While law enforcement only report that eight percent of youth (between twelve to twenty-four year-olds) gang members are white, studies (of twelve to sixteen year-olds) actually suggest they account for forty-two percent of young gang members. For nonwhites, law enforcement report that Latinos account for forty-nine percent and blacks make up thirty-seven percent of youth gangs. In actuality, Latinos make up only twenty-four percent while blacks represent twenty-seven percent. This means that law enforcement are targeting nonwhites fifteen times more often than whites. Greene & Pranis, *supra* note 2, at 36-38.

[30] Sara Lynn Van Hofwegen, Note, *Unjust and Ineffective: A Critical Look at California's STEP Act*, 18 S. CAL. INTERDIS. L.J. 679, 684 (2009).

[31] *Id.*

[32] Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2273 (1998).

[33] Greene & Pranis, *supra* note 2, at 4.

ary actions that oppress innocent minority youth."[34] These young people might be considered gang members if they simply live in certain areas or hang out with gang members.[35] This is especially true for "wannabes"—those individuals who are not members of gangs but who associate with members and might even hope to join one day.[36] When these young people get to court, they face the misperception that they are part of complex criminal enterprises, which results in severe punishments.[37]

These individuals prosecuted in part for their gang membership are overwhelmingly African-American and Latino. "Young men of color are disproportionately identified as gang members and targeted for surveillance, arrest and incarceration" by law enforcement, "while whites—who make up a significant share of gang members—rarely show up in accounts of gang enforcement efforts."[38] In light of the current state of the American criminal justice system, it is unsurprising that gang members are categorically assumed to be poor people of color. After all,

> [c]riminal suspects and defendants are much more likely . . . to be poor and black—two classes that are often thought to do badly in the political arena. And in a world where police and prosecutors have enforcement discretion, criminal suspects are defined by the willingness of public officials (police or prosecutors) to impose heavy costs on them.[39]

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[34] Stewart, *supra* note 32, at 2264.

[35] Bjerregaard, *supra* note 18, at 44.

[36] Stewart, *supra* note 32, at 2275.

[37] *See, e.g.*, 720 ILL. COMP STAT. 5/24-1.8 (2011).

[38] Greene & Pranis, *supra* note 2, at 6. *See also* Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241, 275 (2010) (arguing that "[g]ang injunctions are utilized almost exclusively against Black and Latino residents in low-income communities, and they are primarily applied to youth").

[39] Stewart, *supra* note 32, at 2257, *quoting* William Stunz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20-21 (1996).

Because anti-gang laws target poor, minority youth in urban communities, these disadvantaged children, and not their white counterparts, are suffering under the laws.[40] This application of the law not only misinterprets the problem it seeks to remedy, but it also causes more hardship in the most vulnerable populations.[41] Therefore, in discussing the problems of criminalizing gang membership, it is appropriate to limit the analysis to those who are disproportionately affected by these laws: poor young men of color in urban communities.

B. Why do gangs exist?

The forces that have given rise to and cultivated gang activity inform why anti-gang laws must be eradicated. Historically, people of color joined gangs to escape the racist, violent society that disenfranchised them. Today, young men of color who join gangs are typically searching for something: the upward mobility they have been denied, the security they have gone without. Taken together, these forces illustrate why joining a gang often seems like the only solution to escaping hardship.

While the history of American gangs is somewhat ambiguous, what scholars do know provides context for why certain gangs exist today.[42] Although gangs have existed for centuries, it was not until the 1940s that black gangs began to form.[43] Because "racism and prejudice [were] the order of the day," young black men joined together to protect one another and create a place for themselves in society.[44] Despite these intentions, black communities faced social upheaval and youth endured "a 'process of

[40] *See* Greene & Pranis, *supra* note 2, at 6.

[41] Stewart, *supra* note 32, at 2257, *quoting* Stunz, *supra* note 39, at 20-21.

[42] H. Mitchell Caldwell & Daryl Fisher-Ogden, *Stalking the Jets and the Sharks: Exploring the Constitutionality of the Gang Death Penalty Enhancer*, 12 GEO. MASON L. REV. 601, 614 (2004).

[43] *Id.* at 616-18.

[44] BASTARDS OF THE PARTY (HBO 2005).

destructive socialization'" at the hands of whites.[45] For many poor, young men of color—especially black young men—they had few options: prison or death.[46]

For decades, black gangs swayed between violence and political activism, forming organizations such as the Black Panther Party. This mobilization was not just for protection, but also for the right to have their voices heard[47]and to take back the political power they had been denied. Gangs were a means of achieving this goal.

Eventually, however, the face of the enemy changed. Gangs stopped fighting their white oppressors and started fighting one another. With the arrival of the 1970s and the escalation of white flight, "'extreme ghettoization ultimately cut off black youth from white areas of the city so that black youth gangs began to prey on each other'" instead of their white counterparts.[48] Former Bloods member Cle Sloan points out that even though many people choose to join gangs today, gangs are rooted in a racist, slave history that gave rise to the need to fight off white violence.[49]

Thus, the history behind gang formation, especially for black gangs, cannot be ignored in discussing the fairness of criminalizing gang members. When supporters of anti-gang laws speak about the "choice" to join gangs, it is imperative to acknowledge these historic forces that compelled gang formation as a way of dealing with extreme racism and social isolation, rather than simply choosing to engage in criminal activity.

Today, a host of reasons push many young men of color toward gang life. The most significant risk factor is socioeconomic

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[45] Caldwell & Fisher-Ogden, *supra* note 42, at 618.

[46] BASTARDS OF THE PARTY (HBO 2005).

[47] *Id.*

[48] Caldwell & Fisher-Ogden, *supra* note 42, at 618.

[49] BASTARDS OF THE PARTY (HBO 2005).

status,[50] which often manifests in the form of almost complete joblessness.[51] As sociologist Sudhir Venkatesh discovered during the seven years he spent studying gang life in the Robert Taylor Homes housing project in Chicago, if people do not join gangs to obtain some sort of economic security, they often have to "hustle" to make money.[52] In his interviews with some of Robert Taylor's hustlers, Venkatesh reports:

> [H]ustling jobs for men were in manual labor: you could earn five hundred dollars a month fixing cars in a parking lot or roughly three hundred dollars a month cleaning up at the local schools. The worst-paying jobs, meanwhile, often required the longest hours: gathering up scrap metal or aluminum (a hundred dollars a month) or selling stolen cigarettes (about seventy-five dollars a month). While just about every hustler I interviewed told me that he was hoping for a legit job and a better life, I rarely saw anyone get out of the hustling racket unless he died or went to jail.[53]

Thus, in a poor community such as Robert Taylor, the choices are grim. On the one hand, the choice to join a gang means more money and the opportunity for upward mobility. For example, as Venkatesh learned from a Black Kings leader, J.T., selling drugs in certain neighborhoods provided "easy money" and there were opportunities to move up in the ranks.[54] As one of the mid-level leaders, J.T. could have been making between $30,000 and $75,000 or more annually at any given time.[55] Al-

50 Caldwell & Fisher-Ogden, *supra* note 42, at 622-23 ("historic motivations for gang membership are beginning to give way to a desire for monetary gain").
51 *Id.* at 619.
52 SUDHIR ALLADI VENKATESH, GANG LEADER FOR A DAY: A ROGUE SOCIOLOGIST TAKES TO THE STREETS 59 (Penguin Press 2008).
53 *Id.* at 199.
54 *Id.* at 34-35.
55 *Id.* at 34.

though most gang members never reach this income level, the decision to spend time with well-earning gang members, as opposed to fighting for a couple hundred bucks a month as a hustler, becomes incredibly tempting. This is especially true for someone who has struggled his entire life to survive. Many in this position might claim that this is really no choice at all, but a matter of survival.

The problem, of course, is that gang affiliation often comes with violence and imprisonment.[56] But the alternative paths are no less frightening—poverty in a poor Chicago community like Robert Taylor can leave families without the ability to purchase enough food, buy a winter coat or repair a front door.[57] When the cold Chicago winds enter one's living room, one's path becomes less about "choice" and more about survival.

A variety of other factors also contribute to gang membership. Youth not only face joblessness, but they also experience "family disorganization and lack of parental figures in the home."[58] Specifically, the environment in which these young people are socialized carries many risk factors: presence of drugs and guns, homes broken by parental separation and drug use, decreased educational drive, low self-esteem and, perhaps most importantly, "inconsistency of policing practices" that "create[s] 'an atmosphere of danger on the streets.'"[59] These risks are underscored by a lack of role models to help youth avoid the pitfalls of gang life and, consequently, many turn to gangs to fill this void.[60]

These motivations for joining gangs reveal that when supporters of gang criminalization claim that "[g]angs fill the daily lives of many of our poorest and most vulnerable citizens with . . . terror," they fail to take into account the ways in which gang

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56 BASTARDS OF THE PARTY (HBO 2005).
57 VENKATESH, *supra* note 52, at 150-53, 181.
58 Caldwell & Fisher-Ogden, *supra* note 42, at 619.
59 *Id.* at 622-23.
60 Stewart, *supra* note 32, at 2274.

members themselves are victims of poverty, starvation and a lack of social support.[61] In the face of these hardships, however, lawmakers continue to implement anti-gang laws that exacerbate these problems.

C. How are gangs criminalized?

In an attempt to reduce gang violence and criminal activity, many states have instituted anti-gang laws.[62] They include "increased sentences and penalties for gang activity, injunctions preventing gang members from associating with each other in particular locations and the criminalization of gang participation."[63]

Criminal law statutes are one of the primary tools used to criminalize gang affiliation. After determining that existing criminal laws are insufficient, leaders have instituted "new gang-related crimes" for everything from drugs to guns.[64] Many of these laws impose enhancements on sentences for gang members who engage in this type of already-illegal activity.[65] For example, the Illinois Unlawful Possession of a Firearm By a Street Gang member ("UUW by a street gang member") law makes it a crime for a street gang member to unlawfully carry a firearm and firearm ammunition outside of his home.[66] This ups the ante from the existing unlawful use of a weapon law: it increases the crime from a misdemeanor to a felony, extends the possible prison term from under one year to between three and ten years and takes away the possibility of probation.[67]

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61 *City of Chicago v. Morales*, 527 U.S. 41, 99 (1999).
62 Bjerregaard, *supra* note 18, at 32.
63 Van Hofwegen, *supra* note 30, at 680.
64 Strosnider, *supra* note 26, at 106.
65 Bjerregaard, *supra* note 18, at 32.
66 720 ILL. COMP. STAT. 5/24-1.8 (2011); University of Illinois Law Student Column, *Illinois Law Update*, 98 Ill. B.J. 400, 401 (2010).
67 *See Illinois Law Update*, 98 Ill. B.J. at 401; 720 ILL. COMP. STAT. 5/24-1 (2010).

Similar to criminal statutes, municipal ordinances are another way that lawmakers criminalize gang members. Ordinances are simply legislation passed by municipal, rather than state or federal governments.[68] The seminal case of *Chicago v. Morales* dealt with a city ordinance that empowered law enforcement to issue dispersal orders for individuals who were believed to be gang members.[69] As discussed further below, this ordinance was struck down as unconstitutional, although during its application it resulted in the arrest of 42,000 people.[70]

Civil injunctions are another method for criminalizing gangs. They are civil orders of the court that prohibit activity in certain areas.[71] Injunctions sometimes render legal activities illegal for gang members, and other times they further punish existing illegal activity, similar to the UUW by a street gang member law.[72] In some states, such as California, when an individual is labeled a gang member and issued an injunction, he is entered into a database and can later "receive a sentence enhancement on top of the prescribed prison sentence—for low-level felonies, an extra two to four years; and for violent felonies, an extra ten years."[73]

These efforts bear a striking similarity to the historic, unconstitutional vagrancy laws used to keep former slaves in a state of quasi slavery by restricting how and where blacks could move.[74] Just as disadvantaged people of color were labeled as "vagrants" in order to marginalize them under the guise of criminal behavior, anti-gang laws that prevent young men of color from engaging in certain legal activity or more severely criminalize them for

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68 BALLENTINE'S LAW DICTIONARY (2010).
69 *Morales*, 527 U.S. at 46-47.
70 *Id.* at 49.
71 BALLENTINE'S LAW DICTIONARY (2010); Hofwegen, *supra* note 30, at 680.
72 Myers, *supra* note 6, at 286-87.
73 *Id.* at 291.
74 *Morales,* 527 U.S. at 54; Stewart, *supra* note 32, at 2258.

illegal acts likewise marginalizes disadvantaged people, but under the guise of gang membership.[75]

Overall, the common thread of these anti-gang laws is their focus on increasing punishment for anyone who affiliates with a gang. But these massive deployments of police power against gang members fail to make the streets safer and actually cause more harm than good to the communities they purport to help.[76]

D. The ineffectiveness of anti-gang laws

Evidence shows that police suppression tactics authorized by anti-gang laws "can increase gang cohesion and police-community tensions, and [most strikingly,] they have a poor track record when it comes to reducing crime and violence."[77] When these tactics are implemented, the incidence of violence in a community might remain unchanged, others times it temporarily decreases and then relocates to a nearby community and, sometimes, the violence actually increases.[78]

A response to this data might be that incapacitating gang members—taking them off the streets—inherently prevents them from engaging in gang activity. However, evidence shows that imprisonment actually reduces the likelihood that members will "age out" and leave gangs,[79] and is likely to strengthen one's gang ties in order to survive incarceration.[80]

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75 Vagrancy laws' striking similarity to anti-gang laws, especially injunctions, lies in the "methods of control and banishment of unwanted people who threatened 'financial burden, nuisance and potential criminality.'" Stewart, *supra* note 32, at 2258, *quoting* Caleb Foote, 104 U. PA. L. REV. 603 (1956).

76 *See* Stewart, *supra* note 32, at 2255-56, *citing* David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2555 (1995).

77 Greene & Pranis, *supra* note 2, at 5.

78 Myers, *supra* note 6, at 296-97 ("while some members continue to commit crimes in the target area after an injunction has been imposed against them, others simply relocate to adjoining areas to commit crimes").

79 Greene & Pranis, *supra* note 2, at 4-5.

80 Hofwegen, *supra* note 30, at 690.

Moreover, these suppression tactics worsen conditions in the neighborhoods they purport to save from gang violence:

> By removing so many black men from the community and stigmatizing them forever with a criminal conviction, criminal law enforcement is likely to mean more single-parent families, less adult supervision of children, more unemployed and unemployable members of the community, more poverty, and in turn, more drugs, more crime and more violence. This is not to minimize the burden that criminals themselves present to the community. It is simply to suggest that incarceration—especially on such a massive scale in a well-defined community—is far from an adequate solution, and may well exacerbate the problems associated with crack and crime.[81]

Not only are these laws ineffective, but they also exaggerate the role of gangs in the country's illegal activity. In actuality, gangs do not primarily control the drug trade, and gang-related crime is actually a smaller percentage of overall crime in most areas.[82] In fact, without law enforcement intervention, "[m]ost gang members join when they are young and quickly outgrow their gang affiliation."[83] Because leaving a gang "reduces the risk of negative life outcomes," these anti-gang laws actually contribute to the gang problem rather than remedy it.[84]

The faces of gang members come from a range of racial backgrounds—white, black and brown. However, in courthouses across the country, the faces of prosecuted gang members are almost entirely black and brown. Under many of these anti-gangs laws, these individuals are supposed to endure harsher punishment for certain conduct because they belong to gangs.

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81 Stewart, *supra* note 32, at 2255-56, *citing* Cole, *supra* note 76, at 2555.
82 Greene & Pranis, *supra* note 2, at 4.
83 *Id.*
84 *Id.* at 5.

In reality, they receive harsher treatment in the criminal justice system because of skin color, socioeconomic status and the pervasive confusion that exists among judicial officers, law enforcement, and the public as to how the U.S. should address gang problems. Therefore, because of the criminal justice system's continual failure to proportionately and effectively address gangs, an entirely new discourse is necessary.

III. Traditional Constitutional Challenges: Vagueness and Overbreadth Doctrines

Opponents of anti-gang legislation primarily use two constitutional approaches to challenge these laws: vagueness and overbreadth doctrines.[85] However, appellate courts have historically upheld anti-gang laws in the face of these constitutional challenges.[86] Before proposing a new method of challenging these laws, this critique will first examine why these traditional doctrines fail to eradicate anti-gang laws.

A. Vagueness

A common, yet ineffective avenue for challenging anti-gang laws is the vagueness doctrine. The vagueness doctrine states that a law is unconstitutional if it fails one of two prongs: (1) the law does not give citizens notice of what types of conduct are illegal; or (2) the law authorizes "arbitrary and discriminatory enforcement" by the police.[87] Interpretations of the vagueness doctrine, however, have prevented successful challenges to anti-

[85] Although there are challenges that might not be categorized strictly as vagueness or overbreadth, these other approaches are related and produce similar challenges as those discussed below. *See, e.g.,* Caldwell, *supra* note 38, at 271 (discussing the "effectiveness of means" approach, which analyzes whether the means used to eradicate the problem are effective enough under due process restrictions).

[86] Bjerregaard, *supra* note 18, at 46.

[87] *Morales*, 527 U.S. at 56.

gang laws. First, in order to challenge an anti-gang law for vagueness, one must show that it violates a specific liberty protected by the Due Process Clause of the 5th or 14th Amendments, such as the freedom of movement or travel.[88] Although some anti-gang laws might reach protected liberties, such as by restricting a gang member's right to walk on the street, the U.S. Supreme Court has not found that belonging to a gang itself is a constitutionally protected liberty.[89] Second, the vagueness doctrine enables legislators to enact anti-gang laws as long as they do not contain defects pertaining to the notice or arbitrary enforcement prongs. This invites legislatures to craft laws specifically to avoid vagueness challenges. The *Morales* case illustrates these shortcomings of the vagueness doctrine.

In *City of Chicago v. Morales*, the U.S. Supreme Court used the vagueness doctrine to strike down a Chicago ordinance that empowered law enforcement to issue dispersal orders to gang members.[90] The Court held that the ordinance first failed to provide sufficient notice because what amounted to "loitering" was unclear.[91] Secondly, the Court found that the ordinance gave police too much discretion in determining when someone was loitering.[92]

Notably, the Court gave several ways in which the ordinance could have avoided a successful constitutional challenge. For example, the law could have contained a *mens rea* requirement or limited the populations targeted by the ordinance.[93] The effect of the *Morales* opinion was essentially to affirm the constitutionality of similar ordinances as long as tweaks like these are made. In her concurring opinion, Justice O'Connor confirmed that these types of ordinances would be upheld if lawmakers fix

88 *Id.* at 53, 102.
89 Stewart, *supra* note 32, at 2276.
90 *Morales*, 527 U.S. at 51.
91 *Id.* at 57.
92 *Id.* at 61.
93 *Id.* at 60, 62.

the defects: "[T]here remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example . . . [Chicago could establish] laws that target only gang members."[94] Although the Court struck down the ordinance under the vagueness doctrine, Justice O'Connor expressed no reservations with criminalizing gang membership. The vagueness doctrine, therefore, is an ineffective approach for opponents of anti-gang laws to achieve eradication.

B. Overbreadth

The overbreadth doctrine represents another traditional, yet ineffective, avenue for challenging the constitutionality of anti-gang laws. Similar to the due process protections under the vagueness doctrine, overbreadth requires a showing that the law regulates protected activity under the First Amendment.[95] Again, opponents cannot successfully challenge a law for overbreadth because gang membership alone is not a constitutionally protected category of First Amendment conduct.[96]

Even if courts were to officially recognize gang activities as protected speech or association, lawmakers could easily evade constitutional challenges. For example, if the U.S. Supreme Court determined that a gang member is constitutionally protected when he speaks about being in a gang or meets up with fellow gang members, First Amendment protections would only protect those activities. The moment this gang member engages in some act having nothing to do with the scope of First Amendment protections, he is no longer protected from laws that heighten his punishment for being part of a gang.[97]

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94 *Id.* at 67 (O'Connor, J., concurring) (citations omitted).

95 Stewart, *supra* note 32, at 2276.

96 *Id.* (discussing how according to the Supreme Court, "affiliations between gang members do not merit any recognizable First Amendment protection").

97 *See United States v. Choate*, 576 F.2d 165, 181 (9th Cir. 1978).

A common shortcoming of both the vagueness and overbreadth doctrines is that constitutional challenges are rooted in a showing of explicitly protected conduct. Like all traditional approaches, these doctrines focus on the ways laws infringe upon a person's *conduct* rather than his identity.[98] Even if a gang member were to engage in a constitutionally protected activity, the protection from harsher punishment dissolves the moment he stops this activity. If one day he engages in his freedom to attend a gang meeting, his protections end when he leaves the meeting and returns home that night. He is still a gang member. When he wakes in the morning, he is still a gang member. If he goes to school, he is still a gang member. Gang membership is what a person *is*, not what he *does*. And most importantly, what gang members *do* is often already deemed criminal—these laws simply impose greater consequences because of *who they are*. This is why a new constitutional platform is necessary—one that reflects the sociological reality that gang membership should not be a basis for harsher punishment because it is a guise for one's disenfranchised social status.

IV. The Status Doctrine & Gang Membership

A. The "status" doctrine

The Eighth Amendment ban on cruel and unusual punishment has historically proscribed certain types of punishments.[99] For example, courts typically use the Cruel and Unusual Punishment Clause to find that the death penalty would be an unjust sentence in certain cases.[100] The Supreme Court expanded this constitutional protection in the 1962 *Robinson v. California*[101] decision to "impose[ ] substantive limits on what can be made

98 Stewart, *supra* note 32, at 2276.
99 Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 636-37 (1966).
100 *See id.* at 638.
101 33 U.S. 660 (1962).

criminal."[102] The Court held that individuals may not be punished based on their status.[103] In other words, certain criminal laws amount to cruel and unusual punishment. This is known as the status doctrine.

The law struck down in *Robinson* criminalized being addicted to narcotics.[104] This law was impermissible because it punished an individual not for illegally using or buying drugs, but simply for being an addict.[105] The Court found that this law punished people based on status—an addiction, which it likened to an illness.[106] Such criminalization amounted to cruel and unusual punishment.[107]

The reasoning underlying the *Robinson* opinion was unclear, as reflected in subsequent confusion among lower courts' interpretations.[108] Despite this lack of clarity, however, a central principle emerged from this landmark decision: "[T]here are instances in which the state, despite its legitimate interest in suppressing and correcting a socially harmful condition, may not without violating standards of decency impose criminal sanctions."[109] Before turning to the utility of the status doctrine in eradicating anti-gang laws, an examination of the tangled case law surrounding the status doctrine is warranted.

B. The incoherent landscape of "status" case law

The landscape of Eighth Amendment status doctrine is messy, unclear and incomplete.[110] This critique argues for the need for

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102 Ingraham v. Wright, 430 U.S. 651, 667 (1977).
103 *Robinson*, 370 U.S. at 666.
104 *Id.*
105 *Id.*
106 *Id.* at 666-67.
107 *Id.*
108 Note, *supra* note 99, at 655.
109 *Id.*
110 *See, e.g., Anderson v. City of Portland*, 2009 U.S. Dist. LEXIS 67519 (D. Or. July 31, 2009) (noting how, in the context of homelessness, "[c]ourts have

new precedent rather than relying on the incoherent decisions discussed below.[111]

Following *Robinson*, only one other U.S. Supreme Court case has squarely addressed the status doctrine in 1968: *Powell v. Texas*.[112] However, *Powell* provided little insight into the reasoning underlying *Robinson*. The *Powell* plurality upheld a Texas law that made public drunkenness a crime.[113] In finding that *Robinson* did not apply, the plurality found that the defendant "was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas had thus not sought to punish a mere status, as California did in *Robinson*."[114] The Texas law treated all violators of the law—alcoholics and non-alcoholics—the same. However, in its analysis, the plurality implied that a law punishing alcoholism would be constitutionally impermissible.

The *Powell* plurality further explained,

> The entire thrust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished be-

reached differing conclusions in deciding whether the Eighth Amendment protects" such individuals from punishment).

111 Although some of the case law discussed in this section is non-binding and the opinions come from a range of courts, they are only intended to be illustrative of the chaotic nature of the Eighth Amendment status jurisprudence.

112 392 U.S. 514 (1968).

113 *Id.* at 532.

114 *Id.*

> cause it is, in some sense, "involuntary" or "occasioned by a compulsion."[115]

While this analysis shows that a law should contain an *actus reus* element for it to be constitutionally sound, it does not clarify whether a law may punish unlawful conduct *in addition* to status. This is the case with the UUW by a street gang member law—it has elements of both illegally possessing a firearm and being a gang member.[116] Therefore, it presents a crime with both *actus reus* and status elements.

To understand how this type of law should be interpreted under the *Robinson-Powell* status doctrine, courts should return to the foundational principle that it is cruel and unusual to punish someone for his or her status—for who he or she is.[117] Consequently, it should be impermissible to enact a law like the UUW by a street gang member statute, which punishes someone for illegal conduct while imposing an additional punishment based on status. As an illustration, if a public drunkenness crime existed like that in *Powell*, it would be unconstitutional to enact another, more serious crime of public drunkenness *plus* being an alcoholic.[118] This latter crime has the same effect as a separate law that only punishes alcoholism, which would presumably be unconstitutional under the *Robinson-Powell* precedent.

Despite the strained conclusions scholars can draw from *Robinson* and *Powell*, these decisions are too limited to truly understand the scope of the status doctrine. Not only are they outdated, but they also dealt with physiological status without accounting for sociological or societal status. An examination of subsequent case law only adds confusion to whether the status

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115 *Id.* at 533.

116 720 ILL. COMP STAT. 5/24-1.8 (2011).

117 *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, *supra* note 99, at 655.

118 *Powell*, 392 U.S. at 532.

doctrine applies to sociological types of status, demonstrating why a new understanding of this doctrine is necessary.

In attempting to determine (1) what amounts to a status and (2) whether a law impermissibly punishes individuals based on status, courts have relied on a variety of overlapping and at times contradictory interpretations of *Robinson*.

For example, many courts look to the voluntariness of a condition to determine if it constitutes a status. In some cases, a status only exists if it is entirely involuntary when an individual contracts it.[119] Other opinions have found that when a condition is "only 'rarely' a choice," it amounts to a status.[120] In *Pottinger v. Miami*, a Florida district court found that homelessness was a status because "people rarely choose to be homeless. Rather, homelessness is due to various economic, physical or psychological factors that are beyond the homeless individual's control."[121] Other courts have described this voluntariness factor as the "degree to which an individual has control over the characteristic."[122] Overall, these invocations of the voluntariness approach essentially reflect one consistent principle: those who unknowingly contracted a condition should not be punished for it.[123]

When courts focus solely on whether a person involuntarily contracted his condition, however, they go beyond the reasoning laid out in *Robinson*.[124] The opinion did not go so far as to say that voluntariness was the sole or determining factor in ascertaining status. Rather, it stated that addiction "is apparently an illness which *may* be contracted innocently or involuntarily."[125] Moreover, this voluntariness approach risks taking away status protections for most of the narcotics addicts who would have

119 Tobe v. City of Santa Ana, 892 P.2d 1145, 1166 (Cal. 1995).
120 Pottinger v. Miami, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992), *quoted in* Joyce v. City & Co. of San Francisco, 846 F. Supp. 843, 856 (N.D. Cal. 1994).
121 *Pottinger*, 810 F. Supp. at 1563.
122 *Joyce*, 846 F. Supp. at 857.
123 Note, *supra* note 99, at 654-55.
124 *Id.* at 649.
125 *Robinson*, 370 U.S. at 667 (emphasis added).

been punished under the California law because, in actuality, most addicts do not develop addictions involuntarily.[126] *Robinson* would thus only have applied to those who were born or somehow forced into addiction, yet the Court made no such qualification in its holding.[127] Therefore, the importance of voluntariness is unclear in this analysis, despite the variety of ways in which lower courts have attempted to use it in determining what amounts to a status.

Other opinions have expanded status to specific categories. For example, while some courts have found that homelessness is a status,[128] others have found just the opposite.[129] Some courts have limited status to traits such as national origin, gender, age or illness, many of which are present at birth.[130] Others have not made such specific findings.[131]

Existing case law is even more confusing in terms of the second issue: whether laws have the effect of punishing based on status. Some have found that laws are unconstitutional if status—rather than conduct—is the determining factor,[132] whereas others have taken the more extreme position that only a total absence of an *actus reus* element renders a law unconstitutional.[133] For those laws that contain a conduct or *actus reus* component, some courts have placed significance on the nature of the underlying conduct itself. For example, some courts have taken the position that conduct derivative of one's status must

126 *See Robinson*, 370 U.S. at 665; *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, *supra* note 99, at 649.

127 *See Robinson*, 370 U.S. at 667-68.

128 *Pottinger*, 810 F. Supp. at 1563.

129 *Tobe*, 9 Cal. 4th at 1106.

130 *Joyce*, 846 F. Supp. at 857.

131 *See, e.g.*, *Tobe*, 892 P.2d at 1167.

132 *Farber v. Rochford*, 407 F. Supp. 529, 533 (N.D. Ill. 1975); *Youkhana*, 277 Ill. App. 3d at 113. *See also Doe v. City of Lafayette*, 377 F.2d 757 (7th Cir. 2004) (J. Williams, dissenting).

133 *Tobe*, 892 P.2d at 1166; *Joyce*, 846 F. Supp. at 857.

be innocent to be protected.[134] Other opinions do not address the nature of the criminalized conduct at all.[135]

A common theme among these cases, however, is that there is typically some underlying problem that lawmakers are attempting to remedy, such as drug addiction or homelessness.[136] The governmental interest stems from preventing certain conduct related to the status, such as homeless individuals sleeping outside and consequently blocking public ways.[137] Yet beyond this thread, there is little continuity in the case law interpreting the status doctrine.

Despite the valuable principles underlying the status doctrine, "*Robinson* raises many more questions than it answers."[138] Thus, scholars are left to interpret the status doctrine without the aid of clear interpretive decisions. Yet one foundational principle should guide one's invocation of the status doctrine: it is cruel and unusual to punish people for who they are.[139]

C. Gang membership should be deemed a "status"

Due to the incomplete doctrinal picture of what constitutes a status and the outdated nature of the case law, a new approach to understanding this doctrine is necessary. The question this analysis seeks to answer is, for what should an individual be held legally responsible?[140] A more basic examination of what status

134 *Pottinger*, 810 F. Supp. at 1561-65.
135 *See, e.g.,* United States v. Black, 116 F.3d 198, 201 (7th Cir. 1997) (noting that the defendant was not unconstitutionally punished because he could not show that his unlawful conduct of having child pornography "was involuntary or uncontrollable").
136 *See Robinson*, 370 U.S. at 667 (noting the "vicious evils of the narcotics traffic [that] have occasioned the grave concern of government").
137 *See Anderson*, 2009 U.S. Dist. LEXIS at 19.
138 *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, *supra* note 99, at 655.
139 *See generally*, *id.* (stating that when courts attempt to discern the meaning of *Robinson*, they should return to its underlying principle of decency).
140 *See Powell,* 392 U.S. at 533-34.

is in today's society, in conjunction with the sociological realities of gang life, will provide an answer: an individual should not be criminally responsible solely for his gang membership.

To begin with, the plain meaning of the word "status" is informative. "Status" is defined as "the relative social, professional, or other standing of someone or something."[141] The role of social status is relevant to determining how this doctrine should be applied in the future. Combining this social understanding of status with the central tenet of *Robinson* that people should not be unfairly punished for who they are—their standing in life—this doctrine is plainly applicable to gang membership.

As described in the beginning of this analysis, individuals who are prosecuted under anti-gang legislation almost invariably face dismal socioeconomic conditions. Plagued by poverty and few opportunities for legitimate income, many young men in low-income neighborhoods join gangs.[142] Gang membership might be a way to achieve upward mobility instead of a life of hustling for little money or searching for low-level "legitimate" employment, often to no avail.[143] Thus, joining a gang is often indicative of one's social status. Under the language of *Robinson*, being born in a poverty-infested neighborhood is much like an illness: generations upon generations of people have been oppressed by the more affluent majority, leaving few opportunities to escape their culture of poverty.[144] Just as a narcotics addict may have been exposed to drugs as a small child and subsequently become addicted, a young person in a poor neighborhood might get a taste of a more affluent, protected life with a gang and suddenly find himself unable to return to a life of so-

141 Online Oxford Dictionary, *available at* http://oxforddictionaries.com/definition/status?region=us (last visited Apr. 2, 2012).

142 Stewart, *supra* note 32, at 2255-56, *quoting* Cole, *supra* note 76, at 2555.

143 VENKATESH, *supra* note 52, at 150-53, 181.

144 Stewart, *supra* note 32, at 2255-56, *quoting* Cole, *supra* note 76, at 2547, 2558; VENKATESH, *supra* note 52, at 150-53, 182-83.

cial isolation, poverty and disappointment.[145] Even though the decision to join a gang is not always about survival, the history of street gangs is rooted in the need to survive and the opportunity to thrive.[146] A young man who faces these conditions at birth is therefore dealt a lower social standing than his privileged, white peers. Punishing him more harshly for this, as law enforcement and prosecutors do, violates the central principle of decency that *Robinson* established.[147]

Expanding the status doctrine to gang membership is not simply an attempt to absolve gang members of responsibility for unlawful conduct. Rather, gang members would still be held responsible just as non-gang members when, for example, they unlawfully carry a weapon. In applying this proposition to all anti-gang legislation, states should have to rely on existing penal codes rather than creating new classes of crimes that more severely punish gang members. Lawmakers should not be permitted to find back-door ways to criminalize gang membership by tacking it on to existing crimes and heightening the stakes. Not only are these new classes of crimes ineffective, but they are also rooted in misguided notions about gang problems in America.[148]

Even if one agrees that existing case law is misguided and gang membership should be deemed a status, critics might still contend that anti-gang laws are permissible because they punish illegal *conduct* rather than mere status. For example, one might contend that the UUW by a street gang member law punishes illegal conduct—the possession of a weapon.[149] This position re-

[145] BASTARDS OF THE PARTY (HBO 2005); VENKATESH, *supra* note 52, at 150-53, 181.

[146] BASTARDS OF THE PARTY (HBO 2005).

[147] *See* Note, *supra* note 99, at 655.

[148] *See supra* Part II.A, notes 18–38 and accompanying text.

[149] Transcript of Motion Argument at 11, *People v. Vicente Navarrete*, No. 10 CR 11085 (Ill. Cir. Cook Co. Ct. June 30, 2011) (during oral argument on a constitutionality motion of the UUW by a street gang member law, the prosecutor emphasized that this law did not punish status because it made *conduct* illegal).

flects a belief that it is only unconstitutional to punish "pure status," a condition absent any conduct by the individual.[150] The "pure status" viewpoint finds support in one of the many post-*Robinson* decisions that attempted to interpret the status doctrine. In *Farber v. Rochford*, the Northern District of Illinois found that "[t]here [was] no *actus reus* at all required by the ordinance, only conduct which, while occasionally an 'adjunct' to illicit behavior, is of itself perfectly defensible."[151] This critique is still invoked today by lower Illinois courts as they reject challenges to the UUW by a street gang member law.[152] To these critics, as long as the law punishes some action, it is permissible.

However, the fact that an anti-gang law also contains an *actus reus* element does not remove its criminalization of mere status, as discussed above.[153] In fact, the *Farber* opinion discusses how the unconstitutional law in *Powell v. Texas* "punished an illicit act, public drunken behavior, *rather than* the status of being a chronic alcoholic."[154] The *Farber* opinion thus emphasized the absence of specific criminalization based on alcoholism, regardless of additional criminal elements contained in the law.[155] Moreover, the *Robinson* opinion acknowledged the possibility that a law is partly defective for punishing status when it found that the "portion of the statute referring to 'addicted to the use' of narcotics [was] based upon a condition or status."[156] The essential constitutional flaw therefore lies in what a law does punish—status—rather than what it does not punish—conduct.

Applying this distinction to the UUW by a street gang member law, the statute creates an entirely new crime, apart from the

150 Note, *supra* note 99, at 646-47.
151 *Farber*, 407 F. Supp. at 534.
152 Transcript of Oral Ruling on Motion Argument, *People v. Vicente Navarrete*, No. 10 CR 11085 (Ill. Cir. Cook Co. Ct. July 21, 2011).
153 *See supra* Part IV.B, notes 112–118 and accompanying text.
154 *Farber*, 407 F. Supp. at 533 (emphasis added).
155 *See id.*
156 *Robinson*, 370 U.S. at 662.

existing UUW offense, purely on the basis of status—gang membership. A comparison to the existing UUW law is instructive. Put simply, it is already a crime to unlawfully carry a firearm.[157] The UUW by a gang member law creates a new crime that elevates the class and heightens the sentencing range.[158] In practice, when an individual is charged with unlawfully carrying a weapon in Illinois, on his first offense he will be brought to a misdemeanor courtroom.[159] If he is found guilty, he faces a possible Class A Misdemeanor conviction and less than one year in prison.[160] By contrast, if someone is charged and convicted of unlawful possession of a weapon by a street gang member, he faces a Class 2 Felony for a first offense and between three and seven years in prison.[161] As civil rights advocate and scholar Michelle Alexander discusses, having felony convictions

> relegates people for their entire lives, to second-class status . . . . for drug felons, there is little hope of escape. Barred from public housing by law, discriminated against by private landlords, ineligible for food stamps, forced to "check the box" indicating a felony conviction on employment applications for nearly every job, and denied licenses for a wide range of professions, people whose only crime is drug addiction or possession of a small amount of drugs for recreational use find themselves locked out of the mainstream society and economy—permanently.[162]

Thus, when laws such as the UUW by a street gang member statute impose a felony conviction simply because of gang membership, the defendant suffers a much more severe punishment

157 720 ILL. COMP. STAT. 5/24-1 (2011).
158 *See* 720 ILL. COMP. STAT. 5/24-1.8 (2011).
159 *See* 730 ILL. COMP. STAT. 5/5-4.5-55 (2009).
160 *Id.*
161 *See id.* at 5/5-4.5-35.
162 Alexander Michelle, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 92 (The New Press 2010).

than if he were convicted without the additional gang element. Because of this disparity, laws criminalizing gang membership can be categorized as "second order laws." That is, they are "derived from existing laws but placed in 'new combinations to create new "crimes" from the new combinations.'"[163] Injunctions and ordinances present similar "second order" problems. An injunction might prohibit gang members from engaging in conduct that is already illegal, such as illicit drug use in a particular area.[164] If an individual receives a citation and is subsequently added to the gang database, as in California, that label may lead to automatic sentence enhancements for later crimes.[165] City ordinances similarly "work[ ] in tandem" with substantive criminal laws and contribute to this second order problem.[166]

These second order laws also enable prosecutors to further abuse their charging power.[167] Prosecutors now have the choice to tack on a gang-related charge, which provides "additional plea-bargaining chips."[168] Criminal defendants, in turn, believe that they should take the lower plea deals when prosecutors offer to remove the gang charge.[169] Because it is the prosecutor with the power to seek additional charges, not the defense attorney, the defendant is left powerless to avoid this prosecutorial abuse.

Another critique of expanding the status doctrine might be that it will too drastically reduce the ability of states to use their police power in fighting gang violence. Case law supports this

163 Overton, *supra* note 9, at 422.
164 Myers, *supra* note 6, at 286-87.
165 *Id.* at 291.
166 Strosnider, *supra* note 26, at 107.
167 The prosecutor has the power to bring charges and is expected to only do so when such a decision is supported by probable cause. MODEL RULES OF PROF'L CONDUCT R. 3.8(g)(2)(ii) (2010).
168 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2519 (2004).
169 *Id.*

critique because it shows that courts invoke this doctrine sparingly.[170] In other words, courts rarely use status to intervene. To be clear, this expansion of the status doctrine would constitute a more extreme constitutional stance than courts have held in the past.[171] However, in light of the extensive sociological research showing that nonwhites born into urban poverty often face few options for legitimate survival, fairness demands a shift away from harsher punishment. Fears of under-using police power or over-using the courts must give way to the greater need for ending this unjust criminalization.

D. Alternatives to Criminalization

Rather than employing punitive, ineffective measures in an attempt to shake the gang ties out of young men, lawmakers should turn their attention to more successful, humane approaches that stay true to the central decency principle underlying the status doctrine. In New York City, for example, officials have implemented intervention tactics that have proven very effective.[172] The intervention programs include job training and employment, recreational and after-school activities and mentoring.[173] Since the implementation of these interventionist tactics, crimes that are gang-related have declined and the city "has made a significant dent in gang violence."[174] Approaches like this reveal that lawmakers should end the nationwide war on gangs through police suppression tactics and reallocate these resources for intervention.

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170 *Ingraham*, 430 U.S. at 667-68.

171 Multiple courts have referenced the very limited scope of the "status" doctrine. *See, e.g., Powell*, 392 U.S. at 533.

172 Myers, *supra* note 6, at 300-01.

173 *Id.*

174 *Id.*

V. Conclusion

Many individuals find themselves on the fringes of society because of various handicaps—racial discrimination, extreme poverty, violence in their community and a lack of institutions to insulate them from illegal temptations. Today, lawmakers are compounding the suffering of these populations by punishing them more severely for joining gangs. As a result, the gaps are continuing to widen between white and non-white, rich and poor. The solution to this injustice is to do away with harsher punishments on the basis of gang membership. But traditional approaches are not enough. An entirely new discourse is needed—one that takes into account the human suffering and ineffectiveness underlying this criminalization. Until laws that further handicap people based on status are eradicated, the criminal justice system will continue to be the bearer of *injustice* in America.